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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 592

RONALD J. WOJTAS, A MINOR BY HIS NEXT FRIEND, JOHN C. WOJTAS, RALPH JOSEPH SCHULTE, A MINOR, BY HIS NEXT FRIEND, WILLIAM SCHULTE, JOHN C. WOJTAS AND SOPHIE WOJTAS,

Petitioners,

vs.

VILLAGE OF NILES, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF THE VILLAGE OF NILES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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vs.

VILLAGE OF NILES, a Municipal Corporation of the State of Illinois,

Respondent.

BRIEF OF THE VILLAGE OF NILES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF CASE.

Counsel's statement that counts 3, 4, and 5 are grounded upon "identical facts" with counts 1 and 2 is in error.

Counts 3, 4, and 5 are based upon the law of Illinois. In each of counts 3, 4 and 5 Plaintiffs make the following allegation not found in counts one and two:

> "19 • • •. The actions of the individual defendants hereinabove set forth and complained of upon this count were committed within the course of the duties of the said individual defendants as police officers of

> the said Village of Niles acting within the scope of their authority as such, and the said actions were either committed pursuant to the orders, commands, customs and usages of the said Village or were afterwards ratified, approved and acquiesced in by the said Village or both." (Plf. App. 14, 16, 16 17.)

Counsel's assertion that the Court of Appeals held that there was no jurisdiction of any defendant as to counts 3, 4, and 5 (Pet. 3) is in error. The District Court dismissed the counts as to the Village of Niles. The Court of Appeals affirmed this order. No other question was decided by the Court of Appeals.

The fact that plaintiffs have an alleged cause of action under the Federal Civil Rights Statute against police officers does not give the court jurisdiction of an alleged cause of action to recover money damages from the Village of Niles since the Village is not liable for damages under the Civil Rights Statute.

In *Monroe* v. *Pape* (1961), 365 U. S. 167, 5 L. Ed. 492, 81 S. Ct. 473, the court held that the word "person" as used in the Civil Rights Statute does not include Municipal Corporations:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U. S. 167 at 191.

The court further stated that for this reason the district Judge had properly dismissed the complaint as to the municipal corporation.

> "Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is reversed." 365 U. S. 167 at 192.

Plaintiffs cannot maintain their claim for damages under state law against the Village of Niles in the Federal Court since there is no diversity of citizenship.

In *McPherson* v. *Hoffman*, 275 F. 2d 466, Hoffman was injured in a collision of a truck of the Chesapeake and Ohio Railway with an automobile of McPherson. Hoffman sued Chesapeake in the Federal Court under the Federal Employers Liability Act. Chesapeake filed a third-party complaint against McPherson. Hoffman amended his complaint making McPherson a party. Hoffman recovered judgment against Chesapeake and McPherson. In reversing the judgment the court pointed out that Hoffman and McPherson were both citizens of Michigan. The court held that the district court had no jurisdiction to enter a judgment against McPherson in favor of Hoffman. The holding of this case answers every argument made by petitioners.

In *Pearce* v. *Pennsylvania Railway Co.*, 162 F. 2d 524, plaintiff sued Pennsylvania Railroad and Hofkin. The suit against the Pennsylvania Railroad was based upon the Federal Employers Liability Act and the Safety Appliance Act. Hofkin and plaintiff were residents of Pennsylvania. Plaintiff asked to recover for injuries suffered by the negligence of the two defendants or by the negligence of one of them.

The trial court dismissed the suit as to Hofkin for lack of jurisdiction. The Court of Appeals affirmed. This case answers the contentions in petitioners' brief.

In *Wasserman* v. *Perugini*, 173 F. 2d 305, plaintiff sued to recover for injuries sustained in a collision of a taxi cab and a Post Office mail truck. The plaintiff sued the United States under the Federal Tort Claims Act and the cab operator under state law. The trial court held that the mail truck was not the cause of the injury. It dis-

missed the complaint against the operator of the taxi cab for want of jurisdiction. At page 306 the court said:

> "• • • the plaintiffs could not assert a claim against defendants having the same citizenship irrespective of any rights of contribution from such defendants which the United States might possess."

There is no pendant jurisdiction over a party against whom the plaintiff has no basis to assert a Federal cause of action.

In *Kerr v. Standard Oil Company*, 228 F. 2d 699, plaintiff, a resident of Minnesota sued Standard Oil Company, Inc., incorporated in Indiana and a Minnesota resident, the driver of the Standard Oil Company vehicle. Plaintiff was injured in a collision with the vehicle. Plaintiff recovered judgment against both defendants.

The Court of Appeals reversed because there was no diversity of citizenship between the driver of the truck and plaintiff.

In *Kerr* v. *Compagnie De Ultramar*, 250 F. 2d 860, plaintiff and one of the defendants were citizens of the same state. The defendant filed a motion to dismiss. The plaintiff filed a cross-motion asking to dismiss the complaint as to the resident defendant. The court dismissed the entire suit.

The Court of Appeals held that the plaintiff should be permitted to dismiss the resident defendant.

In this case there is no diversity of citizenship between the plaintiffs and the Village of Niles. Plaintiffs do not claim any colorable cause of action against the Village of Niles under Federal Law. Hence, there is no jurisdiction for plaintiffs to sue the Village of Niles in the Federal Court.

Professor Moore shows that third-party proceedings cannot be used to confer jurisdiction:

> "In the first edition of this Treatise the view was taken that if, as permitted under the Rule, plaintiff A. B. amended his complaint to state a claim against the third-party defendant E. F., independent grounds of jurisdiction would be required to support plaintiff's claim against E. F. The concept of ancillary jurisdiction was not regarded as extending so far as to permit a plaintiff, by this round-about method, to recover a judgment against a citizen of the same state on a nonfederal cause of action." Moore's Federal Practice, 2nd Ed. Vol. III p. 721 ¶ 14.27.

In each of the cases cited in Petition 7 to 8 the plaintiff stated a cause of action against the defendant based on Federal Law. Here plaintiffs have no cause of action of any kind or character against the Village of Niles under Federal Law. They attempt to confer jurisdiction by joining a purely state law cause of action in a cause of action based on Federal Law.

Even where the state law action is against the same defendant as the federal cause of action, the rule of pendant jurisdiction does not permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action in the absence of diversity of citizenship.

Hurn v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148.

Plaintiffs admittedly have no cause of action against defendant, the Village of Niles, under Federal Law. The cause of action under state law is separate and distinct from any cause of action under Federal Law.

In *Hurn* v. *Oursler*, 289 U. S. 238, plaintiff sued to enjoin production of a play on the ground that it infringed plaintiff's copyrighted play. Plaintiff had revised the copyrighted play but the revision had not been copyrighted. Plaintiff submitted the original and the revised to defendant to produce. Plaintiff sued for infringement of the

copyrighted play and for unfair competition with respect to the copyrighted play and the uncopyrighted revision. The court at pages 245-246 made a cryptic statement of pendant jurisdiction:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal GROUND; in the latter it may not do so upon the non-federal CAUSE OF ACTION."

The court further said, 289 U. S. 238 at 248:

> "* * * The bill as amended, sets forth facts alleged to be in violation of two distinct rights, namely, the right to the protection of the copyrighted play, and the right to the protection of the uncopyrighted play. From these averments two separate and distinct causes of action resulted; one arising under a law of the United States, and the other arising under general law. For reasons that have already been made manifest, the latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case."

Since the plaintiff here does not assert any claim of any nature against the Village under Federal Law, it is impossible under the holding of this case for the court

to have any jurisdiction over the Village on the theory of pendant jurisdiction.

We respectfully submit that the petition should be denied.

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